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SABAH FOREST INDUSTRIES SDN BHD

v.

UNP PLYWOOD SDN BHD

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FEDERAL COURT, PUTRAJAYA
ZAKI TUN AZMI CJ
JAMES FOONG FCJ
HELILIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 08-275-2009]

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11 FEBRUARY 2010

JURISDICTION: *Federal Court - Inherent powers - Power to review own decision - Allegation that panel that disposed of appeal was in breach of natural justice - Allegation that panel that disposed of appeal could not review suitability of questions already approved by leave panel - Whether threshold of r. 137, Rules of the Federal Court 1995 satisfied*

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This was a motion under r. 137 Rules of the Federal Court 1995 ('the Rules') to move the Federal Court to re-hear an appeal it had earlier heard and disposed of, on the grounds that there was a breach of natural justice when the panel that heard and disposed of the appeal did not hear the parties on some essential points, and further that, that panel also had no jurisdiction to overrule the earlier decision of the leave panel to grant leave on the proposed questions. The issue that arose was whether the motion had met the threshold of r. 137, and in any case whether the reasoning given by the Federal Court in the appeal proper was sound and therefore deserved no intervention by the present panel.

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Held (dismissing motion)

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Per Zaki Tun Azmi CJ delivering the judgment of the court:

(1) The two issues raised by the applicant in this case do not warrant this court to invoke r. 137 of the Rules. Further, the reasoning given by this court in the appeal proper was sound and no injustice or abuse of process had been occasioned thereby. (para 9)

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Bahasa Malaysia *Translation Of Headnotes*

Ini adalah usul di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('Kaedah-Kaedah') untuk menggerakkan Mahkamah Persekutuan untuk mendengar semula rayuan yang telah pun didengar dan diputuskan olehnya, atas alasan bahawa telah berlaku perlanggaran keadilan asasi bilamana panel yang mendengar dan memutuskan rayuan gagal mendengar pihak-pihak atas beberapa isu penting, dan selanjutnya, bahawa panel tersebut juga tidak berbidangkuasa untuk mengakas keputusan terdahulu panel yang memberi kebenaran supaya soalan-soalan dikemukakan. Isu yang berbangkit adalah sama ada usul di sini memenuhi syarat-syarat pemakaian k. 137, dan walau apapun sama ada taakulan yang diberikan oleh Mahkamah Persekutuan di dalam rayuan induk adalah kukuh dan dengan itu tidak mewajarkan campurtangan panel semasa.

Diputuskan (menolak usul)
Oleh Zaki Tun Azmi KHN menyampaikan penghakiman mahkamah:

(1) Dua isu yang dibangkitkan oleh pemohon dalam kes ini tidak mewajarkan mahkamah ini menggunapakai k. 137 Kaedah-Kaedah. Begitu juga, taakulan yang diberikan oleh mahkamah ini di dalam rayuan induk adalah kuat dan tidak mengakibatkan sebarang ketidakadilan atau salah guna proses.

Case(s) referred to:
Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***
Fitzleet Estates LTD v. Cherry (Inspector of Taxes) [1977] 1 WLR 1345 ***(refd)***
Goldsmith v. Sperrings Ltd [1977] 2 All ER 566 ***(refd)***

Legislation referred to:
Rules of the Federal Court 1995, r. 137

For the appellant - Dato' Dr Cyrus Das (Nobert Yapp & Celestina Stuel Galid with him); M/s Jayasuriya Kah & Co
For the respondent - Alvin John (Marina Tiu with him); M/s Yap Chin & Tiu
Amicus Curaie for the Sabah State Government - Juprin Wong; SFC

Reported by Wan Sharif Wan Ahmad

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JUDGMENT

Zaki Tun Azmi CJ:

[1] By this motion, the applicant, relying on r. 137[1] of the Rules of the Federal Court 1995, sought to move the court for an order to set aside its decision of 11 September 2009 and to order a re-hearing of the appeal. Two grounds were canvassed before us. First, it was alleged that there was a breach of natural justice as the parties were not heard on the essential points of decision and secondly, it was regarding the lack of jurisdiction of that panel of the Federal Court to *de facto* overrule the earlier decision of the leave panel of the Federal Court to grant leave on those questions.

[2] According to the applicant, on the first issue, the decision arrived at by the Federal Court in the appeal was not even argued before the court. Hence, it is a breach of the Audi Altera Partem as the very point that the court considered was thought of by the court itself. In any case if the court were to decide that there is a new issue, the proper procedure would be to invite the parties to address the issue in writing or by relisting the case for hearing on such points.[2]

[3] As for the second issue, it was argued that the court did not have the jurisdiction to review the suitability of the questions framed and already approved by the leave panel. By doing so, it was seen to overrule the decision of the leave panel.

[4] The respondent disagreed by submitting that the grounds of judgment of the Federal Court in hearing of the appeal proper was sound and should not be disturbed. As such, this application should be dismissed with costs.

[5] Our duty at this stage is to identify whether this application meets the threshold of r. 137 of the Rules of the Federal Court 1995. In so doing, we would have to rely on the circumstances under which r. 137 of the Rules of the Federal Court 1995 is allowed.

[6] Such circumstances are well established. In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd*[3], Abdul Hamid Mohamed FCJ (as he then was) said at para 14:

> That leads us to the instant application. What is this applicant seeking to do? It is simply to ask this court to exercise its review jurisdiction to set aside the decision of this court overturning the finding of facts made by the Court of Appeal and reinstating the decision of the trial judge on the facts. That is clearly outside the scope of the review jurisdiction of this court. To allow the application is to invite all the vices that this court has been repeatedly warning against ie, there will be no finality in its judgment and, it will encourage judge-shopping.

[7] In short, there must be a finality to a decision when the matter is brought to Court. I said in *Asean Security Paper Mills Sdn Bhd* at para 45:

> There must be a finality to deciding any dispute. It cannot be reviewed *ad infinitum*. It must end somewhere and in our system, it is the Federal Court. If there is any intention that r. 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself. (See art. 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201.

[8] I have also cited Lord Wilberforce's view regarding review in the House of Lord's decision in *Fitzleet Estates LTD v. Cherry (Inspector of Taxes)*[4] which was referred to in *Denish Madhavan v. Public Prosecutor* (Rayuan Jenayah No. 05-72-2005) which is yet to be reported. There I said the following:

> [10] In *Fitzleet Estates LTD v. Cherry (Inspector of Taxes)*, Lord Wilberforce said the following regarding review of House of Lord's decisions:
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> > My Lords, in my firm opinion, the Practice Statement of 1966 was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, **after a decision has been given by this House with all appearance of finality,** to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House.

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> But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it. (emphasis added)

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[11] *Fitzleet Estates LTD v. Cherry (Inspector of Taxes)* involves issues on whether interest charged on loan by the company is taxable. In the earlier case of *Chancery Lane Safe Deposit and Offices Co. Ltd. v. Inland Revenue Commissioners*[5], the majority of the House of Lords decided that a certain provision of the

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Income Tax Act 1952 applied while two members dissented. In the *Fitzleet Estates* case, the appellant challenged the Chancery Lane case (delivered 11 years earlier) and invited the House of Lords to depart from its earlier decision based on the practice statement cited above. It was in this context that Lord Wilberforce disagreed to permit a litigant to return to the House hoping that

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a differently constituted panel would be persuaded to take the view that its predecessors rejected. According to him, there must be a finality. In England, there has been a reluctance to review any well set principles.[6]

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[12] I realize that the Fitzleet Estates case deals with review of settled principles of law while Rule 137 deals with the power to review its own decision if it is satisfied that there had been injustice. For every case, there must be a finality. Against finality is the issue of whether there had been an injustice. Justice and injustice is very wide and more often than not, subjective.

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[9] Having read their written submission, having heard the applicant and having perused through the reasons given by the Federal Court, I find no reason to allow this application. In my opinion, the two issues raised by the applicant in this case do not

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warrant this court to invoke r. 137 of the Rules of the Federal Court 1995. The reasoning given by this court in the appeal proper is in my opinion a sound reasoning. No injustice or abuse of the process of the court has been occasioned.

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[10] I also find no necessity to delve into the issues in minute detail in this leave for review application.

[11] As such, this motion is dismissed with costs.

[12] My learned brother James Foong Cheng Yuen, FCJ and

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Heliliah Mohd Yusof, FCJ have read this judgment in draft and have indicated their concurrences.

Endnotes:

1. Rule 137 Rules of the Federal Court 1995 – For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
2. See *Goldsmith v. Sperrings Ltd* [1977] 2 All ER 566.
3. [2008] 6 CLJ 1 FC.
4. [1977] 1 WLR 1345.
5. [1966] AC 85; [1966] 2 WLR 251; [1966] 1 All ER 1, HL (E)
6. See *Radcliffe v. Ribble Motor Services Ltd.* [1939] AC 215; [1939] 1 All ER 637, HL (E) and *Nash v. Tamplin & Sons Ltd.* [1952] AC 231; [1951] 2 All ER 869, HL (E).